Supreme Court, U.S.
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91-2061
No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ARTHUR D. JACOBS,
Petitioner,

v.

WILLIAM BARR, *et al.*,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In going beyond the question presented for review and directly addressing the merits of the underlying case, which had not been addressed by the District Court and for which petitioner was never permitted discovery, did the United States Court of Appeals for the District of Columbia Circuit abuse its discretion?

2. In finding the Civil Liberties Act of 1988 and the Aleutian and Pribilof Islands Act constitutional, did the United States Court of Appeals for the District of Columbia Circuit err, as the Acts violate the right to equal protection of the laws guaranteed to petitioner by the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Arthur D. Jacobs, and the respondents, the United States Attorney General and the Secretary of the Treasury of the United States.

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Arthur D. Jacobs petitions for a writ of certiorari to review the opinion and the judgment of the Court of Appeals for the District of Columbia Circuit entered in this case on March 27, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A, *infra*) is reported at 959 F.2d 313 (1992). The opinion of the United States District Court for the District of Columbia Circuit (Appendix B, *infra*) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was filed on March 27, 1992. That Court's order vacating the opinion of the

District Court was entered on March 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Civil Liberties Act of 1988, 50 U.S.C. § 1989b (Appendix C) provides, in pertinent part, for monetary compensation in the amount of $20,000 to Americans of Japanese descent who were relocated or interned during World War II, or their heirs.

The Aleutian and Pribilof Islands Restitution Act, 50 U.S.C. § 1989c (Appendix D) provides, in pertinent part, for monetary compensation in the amount of $12,000 to residents of the Aleutian and Pribilof Islands, or their heirs, who were relocated or otherwise burdened by the United States government during World War II.

STATEMENT OF THE CASE

The term "judicial activism" is a term so often exploited in contemporary legal demagoguery that its meaning has been diluted. However, in the case at hand, the Court of Appeals engaged in a display of judicial activism that was so political in nature, and so blatant in lack of authority, as to remind us once again that judicial activism is, in effect, the politicization of the judicial branch which serves to produce no true victors.

In forming a tripartite system of government, the authors of the United States Constitution endeavored to ensure that each of the executive, legislative and judicial branches would be prohibited from abusing the power which the Constitution vested in them. As understood

then, the system of "checks and balances" would provide, in the form of the federal judiciary, a truly just form of justice.

Through the more than two centuries that this form of government has endured, it has been tested by individuals in the respective governmental branches who, through the use of apparent authority, wish to exceed the limits of the power of their office. Perhaps the most dangerous and least addressable form of such abuse arises in the form of judicial activism.

Because federal judges are not subject to direct check by any other branch of government—because the only restraint on the exercise of their power is self-restraint—procedural rules and doctrines of restraint must be meticulously observed by the majority of this nation's federal courts to prevent the federal judiciary from becoming a political free for all.

This is particularly apparent where, as with the case at hand, judicial activism has resulted in more than a mere flouting of the rules, or a display of a partciular court's political agenda: it has produced an inconsistent and dangerous holding regarding equal protection under the laws of the United States which will effect not only the petitioner, but all citizens of the United States who are discriminated against by the federal government based solely on ethnic origin. The Court of Appeals has, in this case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of This Honorable Court's power of supervision because in its decision to go beyond the issue appealed and reach the merits of the case at hand the Court of Appeals abused its discretion, and because its resolution of the merits was plainly incorrect.

Petitioner

Petitioner, an American citizen of German ancestry, was born in Brooklyn, New York in 1933. As a result of the internment of his German father, and for no other

reason, the petitioner, at age 12, was interned at Ellis Island, New York on February 27, 1945.[1] The petitioner remained at Ellis Island until April 26, 1945, when he and his family were transferred by the United States Government to the Crystal City, Texas internment camp, where they arrived on April 29, 1945.

The internment of the petitioner's father was in direct contradiction of the recommendation of the parole board who heard his case. For despite the recommendation of the parole board which reviewed the case of petitioner's father that he not be interned, he was nonetheless singled out for internment.[2] Petitioner and other family members were interned along with petitioner's father, just as the families of other adult internees were kept with their parents in the internment camps.[3]

Petitioner and his family remained at the Crystal City, Texas internment camp until December 1, 1945, when they were transferred back to Ellis Island, New York, arriving there on December 4, 1945. This was months after the United States had ended its war with Germany.

While confined to the internment camp at Crystal City, the petitioner met and made friends with Japanese children and American children of Japanese descent who were, like him, also interned at Crystal City as a result of the internment of their parents. Based upon his daily contact with his peers of Japanese descent at the intern-

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[1] A crucial distinction, and one which appears to have escaped the attention of the Court of Appeals, exists between "internment" and "relocation." Petitioner wishes to make clear at the outset that, as an internee, he was not free to leave the Crystal City internment camp.

[2] Absent any opportunity for discovery, petitioner is without knowledge as to whether the decision to intern his father was the result of discriminatory sentiment on behalf of certain members of the Department of Justice.

[3] As a twelve year old child, petitioner was without choice as to whether he would be sent to the internment camp with his father, and was never given a hearing at which an alternative was presented.

ment camp, petitioner observed identical conditions for those of Japanese descent and of German descent throughout the duration of his internment.

The Civil Liberties Act of 1988 and the Aleutian and Pribilof Islands Restitution Act

On August 10, 1988, the United States Congress enacted the Civil Liberties Act of 1988 (hereinafter "1988 Act") to make reparation to United States citizens of Japanese ancestry and resident Japanese aliens who were relocated or interned during World War II. The stated purpose of the reparation was to compensate persons of Japanese ancestry, or their heirs, for what were determined to be fundamental violations of their basic civil liberties and constitutional rights which occurred as a result of their relocation or internment during World War II.

In order to effectuate reparation under the 1988 Act, Congress authorized the creation of a fund, the Civil Liberties Public Education Fund. Under the 1988 Act, the Attorney General of the United States is required to identify and locate each individual eligible for payment, and the United States Secretary of the Treasury is required to disburse from the Civil Liberties Public Education Fund the sum of $20,000.00 to these individuals, unless an eligible individual refuses the payment.

As a companion to the 1988 Act, Congress enacted the Aleutian and Pribilof Islands Restitution Act of 1988 (hereinafter "Islands Act") in an effort to provide appropriate compensation for losses to residents of the Aleutian and Pribilof Islands which were attributable to the conduct of the United States Armed Forces and other officials or employees of the United States Government during World War II. Similar to the 1988 Act, the Islands Act established the Aleutian and Pribilof Islands Restitution Fund and provides that the Secretary of the Treasury shall pay to each eligible individual the sum of $12,000.00, unless that individual refused the payment.

Procedural History

On March 9, 1989, the petitioner filed a Complaint for Injunctive Relief and Declaratory Judgment in the United States District Court for the District of Columbia. In essence, the petitioner challenged the constitutionality of the Civil Liberties Act of 1988 and the Aleutian and Pribilof Islands Restitution Act, 50 U.S.C.A. § 1989 *et seq.*

Petitioner complained in the District Court that the 1988 Act and the Islands Act are unconstitutional, as they deny the petitioner equal protection of the laws in violation of the Fifth Amendment to the United States Constitution. Specifically, petitioner complained that the 1988 Act and the Islands Act provide reparations to a limited class of individuals who were relocated or interned during World War II, while denying reparations to identically situated individuals, i.e. the petitioner, with the only distinction being the individual's ethnic origin. Petitioner alleged that he suffered the identical violations of basic civil rights acknowledged by Congress in the 1988 Act and the Islands Act, yet he is denied benefits under the Act solely as the result of his ethnic origin.

Because of the nature of the claim, the named defendants (respondents in this action) are the United States Attorney General and the United States Secretary of the Treasury.

Following the filing of the complaint, the Japanese American Citizens League, the Japanese American Citizens League Legislative Education Committee and others moved to intervene. The trial court, over objection by the petitioner, permitted the intervention.

Following the permission to intervene, the defendants/respondents moved to dismiss the complaint, citing lack of standing and alternative grounds. The motion was filed prior to the taking of any deposition or other dis-

covery by the petitioner. Although the petitioner wished to conduct discovery crucial to his case,[4] no discovery was permitted by the trial court.

In an Order dated January 22, 1991, the United States District Court for the District of Columbia dismissed the petitioner's Complaint. The trial court held that the plaintiff/petitioner lacked standing to challenge the constitutionality of the Acts. The District Court limited its holding to the issue of standing, and did not address the alternative grounds raised by the defendants/respondents.

Specifically, the District Court stated:

> Due to the failure of the plaintiff to establish standing, this action must be dismissed and the Court need not address the second part of the [defendant/respondent's] motion.

The second part of the defendant/respondent's motion addressed the merits of the case.

On February 8, 1991, the petitioner timely filed an appeal of the District Court's January 22, 1991 order in the Court of Appeals for the District of Columbia Circuit. As the basis of his appeal, the petitioner presented the issue as to whether the District Court failed to apply appropriate criteria in determining standing. The standing issue was the only issue presented to the Court of Appeals for review. Furthermore, the issue concerning standing criteria was the sole issue appealed by *either* party, as the defendants/respondents did not file a cross appeal with the Court of Appeals for the District of Columbia Circuit.

In their brief to the Court of Appeals action, the respondents wrote:

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[4] Counsel for the respondent, the United States Department of Justice, is sole custodian of voluminous documents which support the petitioner's case and, absent discovery under the Federal Rules of Civil Procedure, petitioner is without access to the information contained therein.

> "If this Court rules that Jacobs has standing, it should affirm the District Court's judgment on the alternative ground that the Acts which Jacobs has challenged are constitutional. The government moved to dismiss on this ground in the district court and filed a brief that fully addressed this issue. Jacobs also addressed this issue in his pleadings. This issue is ripe for decision, and a remand on it would not serve any useful purpose."

Brief for Appellee at 21.

After hearing oral argument of the case on December 6, 1991, the Court of Appeals issued an opinion on March 27, 1992. While the District Court found for the petitioner as to the issue presented to the Court of Appeals and confirmed that the petitioner did indeed have standing, the Court of Appeals then went beyond the issue presented to it for appeal and ruled on the merits of the case. Despite the lack of discovery on the part of the petitioner, the Court of Appeals ruled that the Acts were constitutional.

In light of the decision by the Court of Appeals to go beyond the issue presented to it and to rule on a case in which discovery had not been permitted, petitioner seeks certiorari from This Honorable Court.

REASONS FOR GRANTING THE WRIT

In its decision to go beyond the issue appealed and reach the merits of the case at hand, the United States Court of Appeals clearly abused its discretion. Furthermore, by reaching beyond the issue appealed and addressing the merits of the case, the Court of Appeals violated the petitioner's guarantee of due process under the Fifth Amendment of the United States Constitution. Finally, the Court of Appeals was flatly incorrect in holding that the 1988 Act and the Islands Act are constitutional, setting a dangerous precedent for the future of equal protection under the laws of the United States.

I. IN GOING BEYOND THE ISSUE PRESENTED, THE COURT OF APPEALS ABUSED ITS DISCRETION AND IMPROPERLY ADDRESSED THE MERITS OF THE UNDERLYING CASE.

The extent of a court's power of review is dependent upon the nature of the decision from which a party appeals. In the case at hand, petitioner appealed from the District Court's dismissal for lack of standing. As the District Court specifically stated that it did not have occasion to rule on the merits, petitioner did not appeal any issue regarding the merits, and the respondent never filed a cross appeal to that effect.

When the District Court dismissed petitioner's case for lack of standing, its decision constituted a dismissal for lack of jurisdiction. For in order for a court to have jurisdiction over a matter, the plaintiff must have standing to bring suit in that court, and the matter must be one for which the court has authority. The Court of Appeals has power to review only questions of law which are properly preserved for review, and it does not have the power to try or retry cases. *O'Malley v. Cover*, 221 F.2d 156, 159 (8th Cir. 1955).

The Court of Appeals is limited to addressing alleged specific erroneous rulings of the District Court. *See Ralston Purina Co. v. Novak*, 111 F.2d 632, 634 (8th Cir. 1940). In his appeal, the petitioner asked the Court of Appeals to review the only ground on which the District Court had ruled: *the issue of standing*. The petitioner *never* asked the Court of Appeals to address the merits of the underlying case, and the respondent *never* filed a cross appeal.

A. The Court of Appeals was Without Power to Address the Merits of the Case, as They Were Not Necessary to a Disposal of the Case as Presented to the Court of Appeals, nor Were They Presented for Appeal.

A Circuit Court of Appeals cannot consider a question not ruled upon by a trial court at trial. It is well settled that where a District Court dismissed a complaint and ruled that it lacked jurisdiction, it could not have intended to rule upon any other question. *Pagano v. Brownell*, 227 F.2d 36, 37 (D.C. Cir. 1955). Thus, in the case at hand the District Court's failure to rule on the merits must be taken as such, and the Court of Appeals cannot be permitted to disregard this and address the merits simply because they feel they know the "correct" answer to questions now presented for their review.

This Honorable Court has long recognized that when a United States Court of Appeals is reviewing the ruling of a District Court which in no way reaches the merits of the underlying case, the Court of Appeals is without jurisdiction to adjudicate the merits of a party's constitutional contentions. *See Goosby v. Osser*, 409 U.S. 512, 523, 93 S. Ct. 854, 861 (1973).

In *Goosby v. Osser*, This Honorable Court found that where the Court of Appeals was charged with reviewing whether the District Court erred in determining that appellants were not entitled to a three-judge court, it did not have jurisdiction to render a holding implying adjudication on the merits of the appellant's constitutional contentions. There, the Court of Appeals had stated:

> "We have carefully considered each of the contentions raised by the [petitioners] and find them to be without merit."

Id. at 523, 93 S. Ct. at 861. For that ruling on the merits, This Honorable Court found that the Court of Appeals had exceeded the scope of its powers.

Although, in the case at hand, the Court of Appeals was reviewing a different error of a district court, the District Court's error in petitioner's case is of the precise nature as that of the District Court in *Goosby v. Osser*. In both cases, the District Court dismissed the case on jurisdictional grounds and failed to reach the merits. In both cases, the Court of Appeals disagreed with the District Court's jurisdictional holding, yet went ahead and addressed constitutional contentions not addressed by the District Court. Therefore, as the Court of Appeals abused its discretion in *Goosby v. Osser*, so too does the Court of Appeals in the case at hand.

An extremely troubling aspect of the decision by the Court of Appeals was its reliance on incomplete facts, set forth only by the respondent and to which the petitioner was incapable of reply, as the petitioner was denied an opportunity for discovery. *See* Section I(C), *infra*. By engaging in a half-cocked fact finding expedition, the Court of Appeals was in effect serving as trial court in this case, in direct violation of its mission as a court of appellate review.

Plainly stated, questions neither considered nor decided by a District Court cannot be considered by a Circuit Court of Appeals. Furthermore, an appellate court cannot provide appellants with a trial de novo, yet that is precisely what the Court of Appeals did for the appellee in this case.

B. The Ruling on the Merits by the Court of Appeals Amounted to an Enlargement of the Rights of the Respondents, Which is Prohiibted Absent a Cross Appeal.

An appellee must file a cross appeal where the appellee seeks an enlargement of its rights through the Court of Appeals. *Sellers v. United States*, 902 F.2d 598, 603 (7th Cir. 1990). And despite the respondents' attempt to cloak their request to address the underlying merits as a request to rule on "alternative grounds," the move

from dismissal for want of standing to a decision on the merits was a clear and indisputable enlargement of the respondents' rights. Therefore, the respondents erred in requesting a ruling on the merits without a cross appeal, and the Court of Appeals erred in enlarging respondents rights through addressing the merits.

In its brief to the Court of Appeals, respondents asked the Court of Appeals to "uphold," on "alternative grounds," the dismissal by the District Court. Petitioner does not dispute that a district court's decision can be upheld on grounds that are different from one expressed by a district court. *See Conecuh-Monroe Community Action Agency v. Bowen*, 852 F.2d 581 (D.C. Cir. 1988). However, in this case the Court of Appeals did not *uphold* the decision of the District Court. Here, the Court of Appeals *vacated* the District Court's dismissal of the case, and exceeded the scope of its power of appellate review by deciding the merits, which had never been completely addressed by the petitioner. By so doing, the Court of Appeals served to enlarge the rights of the respondent, as the case went from being dismissed on jurisdictional grounds to being fully and finally decided on the merits.

Such a clear abuse of the Court of Appeals' descretion mandates a grant of certiorari by This Honorable Court. For even an institution as venerable as the United States Department of Justice cannot deem the merits in this case to be "alternative grounds" for upholding a dismissal, simply by classifying them as such.

Nor can the Department of Justice be permitted to fail to heed the procedural requirements of appellate litigation. The rules of the United States Court of Appeals clearly set forth the requirement for cross appeal. Perhaps the respondents presented their request for a ruling on the merits in their brief rather than by cross-appeal because they failed to meet a filing deadline. This absolutely cannot be tolerated from this nation's counsel.

The respondents, represented by the United States Department of Justice, never filed a cross appeal. Yet the Court of Appeals heeded their call to address the merits, even in the face of their failure to follow procedure. Nowhere is it written that the Department of Justice is held to a different set of requirements than the civil litigant who does not carry the title of the United States. If the Department of Justice is not held to basic procedural standards and safeguards, how can we realistically expect justice for the citizens of the United States?

C. The Court of Appeals was Flatly Incorrect When it Said that the Petitioner had an Opportunity to Address the Merits in its Pleadings, and their Determination on the Issue was Unfairly Prejudicial.

In its decision, the Court of Appeals stated:

> "Although the District Court did not reach the merits of the case, the government argues that they are ripe for decision, and a remand would not serve any useful purpose. Mr. Jacobs addressed the merits in his pleadings, and the government briefed them below and on appeal. At oral argument, Mr. Jacobs' counsel argued strenuously for further discovery, but was unable to show how it could strengthen her client's case. . . . Given the overwhelming evidence supporting Congress' conclusion that there was no mass detention of Germans, and given our deference to Congress' fact finding, we do not agree that further discovery on a scrupulously reported historical question would cast any useful light on the case."

Appendix A at 9.

Notwithstanding the characterization of the record, a ruling on the merits amounted to a denial of discovery here. In going beyond the issue appealed and addressing the underlying merits of this case, the Court of Appeals did so relying on "facts" alleged by the respondents as well as their intervenors, the Japanese American Citizens League. At oral argument, counsel for petitioner

explained to the Court of Appeals that it was not possible to rebut the respondent's allegations without first conducting discovery, as the United States Department of Justice—again, counsel for respondents in this action—controlled all access to documents pertaining to petitioner's case.

Perhaps the Court of Appeals failed to recognize that through its control of access to the documents in this case, the Department of Justice and the respondents in turn controlled the facts. In order to argue his case effectively, the petitioner needed to conduct discovery through requests for production of documents and service of interrogatories which would allow him to demonstrate the merits of his argument.

As the District Court never allowed the petitioner an opportunity for discovery, there was no way in which he could have addressed the merits on appeal. Thus, the Court of Appeals was clearly wrong when it held that the merits had been addressed in the appellate pleadings submitted by petitioner.

Because federal judges are not subject to direct check by any other branch of government—because the only restraint on their exercise of power is self-restraint—they must make every reasonable effort to confine themselves to the exercise of the powers that the Constitution and Congress have given them. *See Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1282 (7th Cir. 1986). Thus, the only way in which the petitioner may require the Court of Appeals to hold itself to addressing only those issues with which it is properly presented is to petition This Honorable Court through a Writ of Certiorari, to make clear to the court below its duty to exercise self-restraint.

The fact that the Court of Appeals would rule on the merits of this case relying solely on evidence presented and controlled by the respondents, and absent any oppor-

tunity for discovery by petitioner, is more than an insult and an affront to the petitioner and to those similarly situated. It was an abuse of that court's discretion, as the case should have been remanded in light of the court's findings of standing. For the several reasons stated above, This Honorable Court must grant this petition for certiorari in order to remedy what was in all respects a constitutionally disastrous course of action by the United States Court of Appeals for the District of Columbia Circuit.

II. THE 1988 ACT AND THE ISLANDS ACT ARE UNCONSTITUTIONAL, AS THEY VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

The Court of Appeals followed the invitation of respondents in characterizing the Acts in question as "benign race-conscious measures," borrowing from the well-founded body of constitutional law which allows legislation substantially related to an important public purpose and narrowly tailored to further a compelling interest. *See generally Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990). This "benign" characterization is not only an insult to those who suffer from discrimination as a result of the challenged Acts, but is also a perversion of constitutional law for which *Metro Broadcasting* was not intended.

In order to address the effects of past injustice, the Congress of the United States possesses remedial powers. *Fullilove v. Klutzkick*, 448 U.S. 448, 483 (1980). However, this remedial power cannot be used in a discriminatory fashion. Such discriminatory use of Congress' remedial power is absolutely prohibited by the equal protection component of the Fifth Amendment Due Process Clause. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (The Fifth Amendment Due Process clause contains an equal protection component prohibiting the federal government from racial discrimination.)

In support of its finding that the challenged Acts are indeed Constitutional, the Court of Appeals gives much deference to Congress' findings in the report "Personal Justice Denied," touted by the respondents and their affiliated amici in the appellate court as dispositive on the issue of the constitutionality of the Acts. But the existence of Congress' findings concerning Japanese Americans during World War II, absent anything further, does not vitiate the invidious nature of the discrimination against the petitioner.

In its decision on the merits of the case, the Court of Appeals boldly asserts that petitioner "cannot show—he does not even allege—that he was interned because of racial prejudice." Appendix A at 13a. This, however, is a complete manipulation by the Court of Appeals of the facts behind Mr. Jacobs' position. Mr. Jacobs was never given access to the documents which could demonstrate that the internment of his father, which consequently led to his own internment, resulted from anti-German sentiment.[5]

The Court of Appeals went on to allege the following:

> "But this much is clear: Congress' finding that "no mass exclusion or detention . . . was ordered against American citizens of German or Italian descent" is broad enough to cover children as well as adults, and it leaves no room for the unlikely suggestion that German American children were the victims of prejudice, while their fathers were not."

Id. Such a bold determination, as it serves to control the court's finding on constitutionality, is dangerous,

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[5] The Court of Appeals appears to scold counsel for petitioner in its observation that "She did not know whether Mr. Jacobs was ordered by the government to accompany his father, or whether he went because his father chose to keep the family together." *Id.* at 13. However, this is but another example of that court's manipulation of the facts, as they fail to also point out that counsel for the petitioner needed to conduct discovery in order to ascertain the exact nature of the order of petitioner's internment.

as it entirely ignores the fact that the petitioner, who while interned at the Crystal City camp received treatment identical to that of his Japanese American peers, nonetheless cannot receive reparation, or even an apology, from the United States; yet under the same set of facts, he would reecive both were he Japanese-American rather than German-American. No matter how extensive the findings of Congress, that is discrimination based upon race, and is unconstitutional.

It is difficult for many to accept that remedial efforts in the interest of one ethnic group can serve to violate the constitutional rights of another ethnic group. Yet as this court recognized in *Regents of University of California v. Bakke*, 98 S. Ct. 2733 (1978), preferring members of any one group based on ethnic origin is discrimination for its own sake and is forbidden by the Constitution.[6]

As has been plainly set forth by This Honorable Court, the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color; if both are not accorded the same protection, then it is not equal. *Id.* at 2748. By basing its ruling on a report prepared by Congressional staffers, and on the "facts" as characterized by the respondents, the Court of Appeals apparently let its sympathies for the past injustices suffered by an ethnic minority cloud its judgment as to the constitutionality of measures seeking to remedy those injustices.

That the Court of Appeals saw fit to base its finding of constitutionality on an incomplete set of facts is alarming. The "facts" upon which it based its decision were one-sided, representing the view of respondents and their affiliated amici, not the view of Congress. No matter

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[6] In *University of California v. Bakke*, This Honorable Court addressed equal protection and state government action under the Fourteenth Amendment. While the case at hand involves equal protection and federal government action under the Fifth Amendment, identical concepts apply. *See, e.g., Washington v. Davis.*

what amount of "deference," or "great weight," a Court of Appeals is required to give the findings of Congress, the mere existence of Congressional findings does not serve to impart constitutionality upon a discriminatory act.

The finding of constitutionality by the Court of Appeals appears to be the work of an activist court seeking to control the use of the constitution for its own political ends. This is not a role to be permitted of any appellate court, as the laws of equal protection cannot be selectively applied at the whim of a federal judge.

Despite the best efforts of the United States Court of Appeals to frame Congress' discriminatory legislation in terms of Congress' good intentions, there is no escaping the Constitution's absolute prohibition against race-based discrimination. By declaring the Acts constitutional, the Court of Appeals compromised both the rights of the petitioner, and the Constitution itself.

CONCLUSION

The decision below, on an issue of profound national importance, constitutes a grave abuse of discretion by the Court of Appeals, a violation of the petitioner's right to equal protection under the Due Process Clause of the Fifth Amendment, and sets a seriously flawed precedent in the area of equal protection law. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 6, 1991 Decided March 27, 1992

No. 91-5061

ARTHUR D. JACOBS,
Appellant

v.

WILLIAM P. BARR,* *et al.*,
Appellee

On Appeal from the United States District Court
for the District of Columbia

Greta Van Susteren, with whom *John P. Coale* was on the brief, for appellant.

Irving Gornstein, Attorney, Department of Justice, for appellees.

William K. Tom was on the brief, for Amici Curiae, urging that this Court affirm the District Court's decision to dismiss Mr. Jacob's complaint.

Before: MIKVA, *Chief Judge*, EDWARDS and RUTH B. GINSBURG, *Circuit Judges*.

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* Richard Thornburgh was Attorney General of the United States when Mr. Jacobs filed his complaint on March 9, 1989. William P. Barr is now Attorney General, and he has been substituted for Mr. Thornburgh under Fed. R. App. P. 43(c).

Opinion for the Court filed by *Chief Judge* MIKVA.

MIKVA, *Chief Judge*: Fifty years ago, President Roosevelt authorized his Secretary of War to send Japanese Americans to internment camps solely because of their race. Four years ago, Congress passed a Civil Liberties Act to compensate the victims of the policy, and to apologize for the "grave injustice" they had suffered. 50 App. U.S.C. § 1989(a). Today, Arthur Jacobs, an American citizen who says he was detained with his German father in 1945, argues unexpectedly that the Civil Liberties Act is unconstitutional. Because the Act compensates interns of Japanese and Aleutian, but not German, descent, he says it denied him the equal protection of the laws.

We disagree with the district court's conclusion that Mr. Jacobs has no standing to bring his suit. He alleges that he was denied compensation under the Act even though he, like the children of Japanese Americans, was interned by the United States government, and that is enough to establish injury under Article III. But we reject Mr. Jacob's claim on the merits. After three years of testimony from hundreds of witnesses, Congress concluded that Japanese Americans were detained *en masse* because of racial prejudice and demagoguery, while German Americans were detained in small numbers, and only after individual hearings about their loyalty. Congress's conclusions, which are amply supported by the historical record, suggest that the decision to compensate Japanese but not German Americans can survive the most exacting equal protection review—let alone the intermediate scrutiny that the Supreme Court requires us to apply.

II. BACKGROUND

Arthur Jacobs was born in Brooklyn in 1933 and was interned, along with his German father, at Ellis Island in February, 1945. His complaint alleges that was interned "as a consequence of the internment of his father," ¶ 15,

out he provides no details about why, precisely, either he or his father was interned. (At oral argument, his counsel conceded that the father was interned after an individual hearing, rather than as part of a mass deportation program of the kind directed against the Japanese. She could not say, however, whether Mr. Jacobs was ordered by the government to accompany his father, or whether he went because his father chose to keep the family together. Transcript of Oral Argument at 12.) In April, 1945, the family was transferred to an internment camp at Crystal City, Texas, where they remained until the beginning of December. At Crystal City, Mr. Jacobs says that he was treated no differently than the children of Japanese interns, who taught him, he alleges, how to "eat sushi" and to make "sandals and kites." *Affidavit of Arthur D. Jacobs* at 2.

On August 10, 1988, Congress passed the Civil Liberties Act of 1988, Title I of "An Act to Implement the Recommendations of the Commission on Wartime Relocation and Internment of Civilians." Pub. L. No. 383; 50 App. U.S.C. § 1989-1989d. Recognizing that "a grave injustice was done both to citizens and permanent resident aliens of Japanese ancestry by their forced relocation and internment during World War II," Congress attempted to make amends by issuing a formal apology and $20,000 to each Japanese intern. 50 App. U.S.C. §§ 1989a, 1989b-4. In the same legislation, Congress passed the Aleutian and Pribilof Islands Restitution Act, which authorizes an apology and an award of $12,000 to each eligible Aleut. 50 App. U.S.C. §§ 1989c, 1989c-5. Congress found that the Aleuts were relocated to Alaska "long after any potential danger to their home villages had passed" and that the "United States failed to provide reasonable care" for them and for their property. 50 App. U.S.C. § 1989a(b).

Congress passed the Civil Liberties Act after collecting volumes of evidence about the injustices suffered by Japanese Americans. It had previously authorized three years

of investigation by a Commission on Wartime Relocation and Internment of Civilians. The Commission's conclusions, presented to Congress in a December 1982 report called *Personal Justice Denied*, relied on hundreds of thousands of documents and testimony from over 750 witnesses. *Id.* at vii, 1. The Commission found unambiguously that Executive Order No. 9066 and the military orders affecting Japanese Americans were the products of prejudice and demagoguery, rather than military necessity. *Personal Justice Denied* at 4-6, 27-46. But it also found that "no mass exclusion or detention, in any part of the country was ordered against American citizens of German or Italian descent," and that actions against German or Italian aliens were "much more individualized and selective than those imposed on the ethnic Japanese." *Id.* at 3.

In enacting the Civil Liberties Act, Congress noted that the premises relied on in Supreme Court decisions upholding the internment have been repudiated by scholars, by former government officials, and more recently, by courts. *See, e.g.*, H.R. Rep. No. 278, 100th Cong., 1st Sess. 9 (1987). In 1983, Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, who had challenged the constitutionality of the internment, reopened their landmark federal cases through writs of error *coram nobis*. Their wartime convictions for defying the internment policy were vacated, based on evidence that the government had misrepresented and suppressed evidence that racial prejudice, not military necessity, motivated the internment of Japanese Americans. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 83-151 BE (D. Or. 1984), *remanded*, 772 F.2d 1496 (9th Cir. 1985). None of the decisions was reversed on appeal. For an admirable review of the history of the internment policy, see *Hohri*

v. United States, 782 F.2d 227, 231-39 (D.C. Cir. 1986) (Wright, J.), *vacated*, 482 U.S. 64 (1987).

Mr. Jacobs filed this purported class action for injunctive and declaratory relief on March 9, 1989. Complaint ¶¶ 1, 7. Because only interns of Japanese and Aleutian ancestry are entitled to redress under the Civil Liberties Act, he alleges that it discriminates on the basis of national origin in violation of the Fifth Amendment. *Id.* ¶¶ 1, 8, 17-19. On January 22, 1991, the district court held that he had failed to allege facts establishing his standing to challenge the Civil Liberties Act and dismissed the action. Mem. Op. at 15 (Jan. 22, 1991).

This appeal followed.

II. Analysis

A. *Standing*

The constitutional requirement for standing has three prongs. First, plaintiffs must allege that they have suffered some actual or threatened injury; second, the injury must be fairly traceable to the challenged official conduct and, third, there must be a substantial likelihood that the alleged injuries will be redressed by a judicial decision in the plaintiffs' favor. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The broad injury that Mr. Jacobs alleges is that the Civil Liberties Act of 1988 denies him the equal protection of the laws. Complaint, ¶ 17. When the injury alleged is the denial of equal protection, plaintiffs must also allege that they are being denied equal treatment solely as a result of the classification they are challenging. *Heckler v. Mathews*, 465 U.S. 727, 738 (1984).

The district court dismissed the complaint because it concluded that Mr. Jacobs had failed to allege any injury at all:

> The fact that he was interned is simply not enough to establish standing. As the government notes, the

> plaintiff does not allege that there is any similarity between his internment and that of those persons referred to in the above Acts . . . . [A]ll the plaintiff argues is that he was interned as the result of his father's internment. His father may well have been interned for valid reasons . . . .

Mem. Op. at 13-14; *id.* at 11 ("This Court cannot discern the basis upon which the plaintiff contends that he has been injured by the 1988 Act.").

We conclude that the district court has confused standing questions with defenses on the merits. Mr. Jacobs *does* allege that there is a similarity between his internment and that of the Japanese and Aleuts. In his complaint, he alleges: "Although Plaintiff experienced the precise harms and losses that the individuals of Aleutian or Japanese ancestry experienced, Plaintiff is not receiving compensation for his harm and losses." Complaint, ¶ 16. And in his response to defendant's motion to dismiss, he alleges: "Plaintiff suffered the same injury *as a result of the same governmental conduct* yet is denied the relief to which he is equitably entitled due to impermissible discrimination or exclusion and for no other reason." *Plaintiff's Response to Defendant's Motion to Dismiss*, filed 7/5/89, at 15-16 (emphasis added).

Mr. Jacobs complaint is imprecise, but it is sufficient to satisfy the *Heckler* test which merely requires him to allege that he suffered the same injuries as the Japanese and Aleuts, and that he has been denied compensation because of his national origin. The fact that Mr. Jacobs says he was interned, in other words, *is* enough to establish injury for standing purposes; he is not required to allege at the outset that he was interned *for the same reasons* as the Japanese and Aleuts, as the district court suggested. Evidence that the reasons were, in fact, radically different—that the Japanese children, for example, were interned because of virulent racial prejudice while Mr. Jacobs was interned after his father received an individu-

alized hearing—is a defense on the merits, not a bar to standing.

The district court also erred when it concluded that "without further facts, the Court must assume that the actions of the government were valid." Mem Op. at 14. The Supreme Court has repeatedly stated that when "ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969)); *see also National Wildlife Federation v. Burford*, 835 F.2d 305, 312 (1987) (D.C. Cir. 1987).

The government urges us to impose an even higher standing barrier than the district court. To establish standing, it argues on appeal, Jacobs "must show that he satisfies all the statutory criteria for receiving compensation other than being a person of Japanese ancestry." Appellees' Brief at 18. In the government's view, the only people who have standing to challenge the Civil Liberties Act are those who, but for their race, would themselves have been victims of Executive Order No. 9066. Like the district court, the government confuses standing with merits questions. We reject its ingenious theory, which would have the effect of barring most equal protection challenges even before they have been presented. *Cf. McCarthy v. Madigan*, 60 U.S.L.W. 4191 (U.S. March 4, 1992) (cautioning against implication of exhaustion requirement not ordered by Congress or based on sound exercise of judicial discretion).

Since we think Mr. Jacobs has adequately alleged injury, we turn to the remaining tests for standing, which he passes easily. The alleged injury (denial of the compensation that equal protection demands) is traceable to the asserted unconstitutional classification in the Civil Liberties Act. As for redressibility, the Supreme Court

has noted that a court sustaining an equal protection challenge faces two remedial alternatives:

> [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion. For that reason, we have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class.

Heckler v. Mathews, 465 U.S. at 738-39.

In this case, a court could order the benefits of the Civil Liberties Act to be extended to Mr. Jacobs, or it could declare the statute a nullity. Congress would then either rewrite the Act to include German Americans in Mr. Jacobs's class, or it would discard the legislation. In either case, the equal protection violation would be redressed. *See generally Califano v. Westcott*, 443 U.S. 76, 89-91 (1979) (distinguishing invalidation from extension).

B. *Further Discovery*

Although the district court did not reach the merits of the case, the government argues that they are ripe for decision, and a remand would not serve any useful purpose. Mr. Jacobs addressed the merits in his pleadings, and the government briefed them below and on appeal. At oral argument, Mr. Jacobs's counsel argued strenuously for further discovery, but was unable to show how it could strengthen her client's case. Her only suggestion was that examination of the War Department's files might uncover secret evidence that General DeWitt or Secretary of War Stimson said: "We don't like the Germans; let's gather them up and let's lock them up like we are doing

the Japanese." Transcript of Oral Argument at 44. She does not appear to have read the report of the Congressional Commission, which notes that General DeWitt *did* press for a program that would have allowed the removal of several thousand Germans and Italians from the West Coast. *Personal Justice Denied* at 286. But because of widespread political opposition to mass detention of Germans and Italians, Secretary Stimson persuaded President Roosevelt to reject the proposal. *Id.* at 287. Given the overwhelming evidence supporting Congress's conclusion that there was no mass detention of Germans, and given our deference to Congress's fact finding, we do not agree that further discovery on a scrupulously reported historical question would cast any useful light on the case.

In his pleadings below, Mr. Jacobs did make the remarkable (and entirely inconsistent) argument that further discovery would help him to prove that "there was a military justification for the large-scale exclusion of individuals of Japanese descent," because many Japanese were trying to organize "massive fifth-column activities." *Plaintiff's Response* at 3-4. Access to government archives, Mr. Jacobs believed, would help him "demonstrate that there was a good faith basis for the government to promulgate the exclusion orders, that the wartime exclusion and relocation was undertaken in a reasonable manner, [and] that the Plaintiff is, in fact, similarly situated to the persons being compensated under the Acts . . . ." *Affidavit of Philip B. Allen* at 2.

It is not clear why Mr. Jacobs toyed with the idea of *defending* the internment policy, except to argue in the alternative that even if his father *had been* legitimately detained because his loyalty was suspect, many Japanese were disloyal as well. (The bizarre theory seemed to be that Congress deprived disloyal German interns of equal protection when it compensated disloyal Japanese interns. *Plaintiff's Response* at 23.) Mr. Jacobs's appellate counsel,

fortunately, suggested at oral argument that her client was no longer seeking discovery on the question of Japanese American treachery, and would concentrate instead on uncovering evidence of prejudice against German Americans. Since Congress has examined that evidence exhaustively, we conclude that the questions that remain in dispute are constitutional not factual, and we have all the information we need to decide them. We turn, therefore, to the merits.

C. *The Merits*

1. *Standard of Review*

There is an initial dispute about our standard of review. In *Metro Broadcasting Inc. v. FCC*, 110 S. Ct. 2997 (1990), the Supreme Court held that "benign race-conscious measures mandated by Congress—even if those measures are not 'remedial in the sense of being designed to compensate victims of past governmental or societal discrimination'—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives." *Id.* at 3008-09 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

It would seem hard to claim that the Civil Liberties Act of 1988—which *was* designed to compensate victims of past governmental discrimination—should be subject to even stricter scrutiny than the nonremedial measures upheld in *Metro Broadcasting*. Mr. Jacobs, however, insists that the Civil Liberties Act should be subject to strict scrutiny, and should be upheld only if it is narrowly tailored to meet a compelling governmental interest. *Plaintiff's Response* at 22; *see also* Reply Brief for Appellant at 4 (incorporating merits arguments from pleadings below). *Metro Broadcasting* compels us to reject his argument.

There are not yet any cases applying strict scrutiny to remedial racial classifications approved by Congress; on the contrary, strict scrutiny has only been applied to race-conscious remedies designed by municipalities, or lower courts. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate."); *see also United States v. Paradise*, 480 U.S. 149 (1987) (district court's race conscious remedial order subjected to strict scrutiny). The *Paradise* Court, however, noted:

> Although this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis. We need not do so in this case however, because we conclude that the relief ordered survives even strict scrutiny analysis.

Id. at 166-167.

Like the *Paradise* Court, we have no doubt that the Civil Liberties Act of 1988 *could* survive the strictest scrutiny, and like the *Paradise* Court, we will apply the more exacting test for demonstrative purposes only.

The *Metro* Court made another distinction that controls our decision in this case:

> Although we do not " 'defer' " to the judgment of the Congress and the Commission *on a constitutional question* . . . . we must pay close attention to the expertise of the Commission and the factfinding of Congress *when analyzing the nexus* between minority ownership and programming diversity. With respect to this "complex" *empirical question*, we are required to give "*great weight* to the decisions of Congress and the experience of the Commission."

Id. at 3011 (emphases added) (citations omitted).

The holding of *Metro*, in other words, is that although courts should not defer to Congress on constitutional questions, we *should* defer—or give "great weight"—to Congress on empirical questions. We see no difference between "great weight" and "deference," which the Supreme Court and this Court have consistently treated as synonyms. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 64 (1981); *Commonwealth Edison Co. v. United States Dept. of Energy*, 877 F.2d 1042, 1045 (D.C. Cir. 1989).

In light of *Metro* and its predecessors, we must give "great weight" to Congress's factual findings that the Japanese internment program was "motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership," 50 App. U.S.C. § 1989a, while the internment of Germans and Italians was not.

2. Congress's Conclusions

In enacting the Civil Liberties Act, Congress sought to remedy "a grave injustice" and "fundamental violations" of "basic civil liberties and constitutional rights." 50 App. U.S.C. § 1989a. In particular, Congress found that the Japanese internment policies "were carried out without adequate security reasons" and "were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." *Id.* "The Government unquestionably has a compelling interest in remedying past . . . discrimination by a state actor," *United States v. Paradise*, 480 U.S. at 167, especially discrimination as ugly as the policies endorsed by the government in *Korematsu v. United States*, 323 U.S. 214 (1944). Unless Mr. Jacobs can show that he, like the children of Japanese descent, was interned because of racial prejudice, then it seems obvious that the remedy Congress chose in the Civil Liberties Act (compensating children of Japanese but not German descent) is substantially related to the ends of the Act (compensating those who were interned because of racial prejudice). The remedy, in fact, would represent a "per-

fect fit between means and ends." *Croson*, 488 U.S. at 526-27 (Scalia, J., concurring in the judgment).

But Mr. Jacobs cannot show—he does not even allege —that he was interned because of racial prejudice. The children of Japanese descent were not interned simply becauses their parents were interned, but because they themselves were subject to the Civil Exclusion Orders issued pursuant to Executive Order No. 9066. *See, e.g., Ex Parte Mitsuye Endo*, 323 U.S. 283, 288 (1944) (emphasis added) (Civilian Exclusion Order No. 52 excludes "*all persons* of Japanese ancestry, both alien and non-alien" from Sacramento, California). Mr. Jacobs, by contrast, alleges that he was interned not as a consequence of racial prejudice, but "as a consequence of the internment of his father." Complaint, ¶ 15. He provides no other details about why, precisely, his father was interned; but his counsel conceded at oral argument that the father was interned as a result of an individual hearing, rather than a mass deportation policy of the kind directed against the Japanese. Transcript of Oral Argument at 15. She did not know whether Mr. Jacobs was ordered by the government to accompany his father, or whether he went because his father chose to keep the family together. *Id.* at 12. But even if we assume that Mr. Jacobs was ordered to accompany his father, he cannot prevail unless he can prove the following, improbable proposition: that although his father was interned after a valid hearing, he, Jacobs, was ordered to accompany his father because of "racial prejudice, wartime hysteria, and a failure of political leadership." 50 App. U.S.C. § 1989a.

After extensive testimony, however, Congress found that "*no* mass exclusion or detention, in any part of the country, was ordered against American citizens of German or Italian descent. Official action against enemy aliens of other nationalities were much more individualized and selective than those imposed on the ethnic

Japanese." *Personal Justice Denied* at 3 (emphasis added). Congress does not appear to have distinguished in its findings between the treatment of the children of German interns and the treatment of the interns themselves. We do not know, therefore, whether children like Mr. Jacobs were ordered to accompany their fathers as a matter of course; if so, whether they received hearings; or if not, whether it was simply assumed that families would stay together. But this much is clear: Congress's finding that "no mass exclusion or detention . . . was ordered against American citizens of German or Italian descent" is broad enough to cover children as well as adults, and it leaves no room for the unlikely suggestion that German American children were the victims of prejudice, while their fathers were not.

If evidence before Congress *had* suggested that German children experienced the same racial prejudice as Japanese children, Mr. Jacobs could certainly argue that Congress was wrong to extend benefits arbitrarily to the Japanese alone. *Cf. Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). Of course Congress cannot exclude an identifiable group from a remedial program because of racial or ethnic prejudice. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 359-360 n. 35 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.). But Congress has concluded that Germans were *not* subject to the same prejudice as Japanese, and we must give its empirical conclusion "great weight." *Metro Broadcasting*, 110 S.Ct. at 3008.

Congress's findings, in any case, would survive any standard of review, since the historical evidence is hardly controversial. (The evidence is discussed in detail in chapter 12 of the Commission's report, "Germans and German Americans," *id.* at 283-293.) The report concludes that in the spring of 1942, the War Department debated whether the power of Executive Order No. 9066 should be used to exclude categories of German and

Italian aliens. There were no serious proposals for the mass deportation of all Germans and Italians, but General DeWitt pressed for the removal of several thousand aliens from the West Coast. President Roosevelt rejected the proposal because of widespread political opposition to the detention of Germans and Italians. When the evacuation of the Japanese was about to begin, a congressional select committee called the mass movement of Germans and Italians "out of the question if we intend to win this war." *Report of the Select Committee Investigating National Defense Migration*, U.S. House of Representatives, 77th Cong., 2d Sess., H.R. Report No. 1911, p. 24. Accordingly, General DeWitt on the West Coast, and General Drum on the East Coast, issued individual exclusion orders to a small number of Germans and Italians. *Personal Justice Denied* at 288. The report concludes that visceral prejudice toward Asians, combined with the political influence of Germans accounted for the very different treatment of Japanse and German Americans. *Id.* at 289.

The report also points to cases reversing individual German American exclusion orders as further evidence of the lack of widespread prejudice toward Germans. *Id.* at 115-16, (discussing *Schueller v. Drum*, 51 F. Supp. 383 (E.D. Pa. 1943) and *Ebel v. Drum*, 52 F. Supp. 189 (D. Mass 1943)). These cases are different from the Japanese cases in three respects. First, the exclusion of German Americans, unlike the mass exclusion of Japanese Americans, involved individual administrative and judicial proceedings which focussed on the military threat posed in each case. *Personal Justice Denied* at 115-16. Second, courts in the German American cases took a skeptical, rather than deferential, view of the military's sweeping claims about the threat posed by the excluded person. *Id.* Comparing Mr. Ebel's case with Mr. Hirabayashi's, for example, the *Ebel* court concluded: "There is no such question of discrimination involved in this case. The plaintiff Ebel was not ordered excluded

because he was a German or because he was a naturalized citizen, but only on the ground he was dangerous to the national defense." *Ebel v. Drum*, 52 F. Supp. at 194.

Finally, many of the German exclusions were reversed, even though the evidence against the individuals in question was much more compelling than the vague accusations directed at the Japanese. Mr. Ebel, for example, kept up intimate contacts with the German consul, and was an enthusiastic fundraiser for the Kyffhaeuser Bund. *Id.* at 192. The court described Mr. Scherzberg as someone "more imbued with Nazi principles than with American ideals," *Scherzberg v. Maderia*, 57 F. Supp. 42, 47 (E.D. Pa. 1944), especially since he called the British catastrophe at Dunkirk "a good thing," and had installed a short wave radio in his car to beam Nazi propaganda throughout greater Philadelphia. *Id.* at 43-44. Both men, nevertheless, were freed, while Japanese Americans, whose loyalty was never questioned, were imprisoned.

In debates over the Civil Liberties Act of 1988, individual members of Congress also emphasized the very different treatment of Japanese and German Americans. Representative Frank, for example, said: "I don't see how anybody can look at these historical events and deny that racial prejudice is there, when Japanese Americans were treated so differently than German Americans, Italian Americans, or Americans who had an ethnic ancestry affiliated with any other country." *Legislation to Implement the Recommendations to the Commission on Wartime Relocation and Internment of Civilians: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. of the Judiciary*, 100th Cong., 1st Sess. 157 (April 29, 1987). Representative Lowry, similarly, explained that he had grown up in a part of Washington in which almost everyone was German, and none of them was interned

during the War. *Civil Liberties Act of 1985 and Aleutian and Pribilof Islands Restitution Act Part 1: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 61 (April 28 and July 23, 1986). Representative Panetta, a co-sponsor of the House bill, found it "bitterly ironic—and an unattractive reflection of fear and prejudice—that Americans of German or Italian ancestry were not considered a similar threat even though we were also at war with those countries." *Id.*, 99th Cong., 2d Sess. 1520 (April 28 and July 23, 1986). And Representative Mineta, who had himself been interned, said: "We did not lock up German-Americans. We did not lock up Italian-Americans. . . . Why is it that we just happened to lock up an ethnic group subject to decades of blatant and cruel discrimination? Because this was the group that popular opinion . . . demanded to have locked up." *Japanese American and Aleutian Wartime Relocation: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 75 (June 20, 21, 27, and Sept. 12, 1984).

All this is to say that Congress considered extensive evidence that Japanese Americans were the victims of widespread racial prejudice, while German Americans were not; and we would confidently uphold Congress's factual conclusions even if we were not compelled, as we are, to give them "great weight." We conclude, therefore, that Congress's decision to compensate Japanese but not German Americans is substantially related (as well as narrowly tailored) to the important (and compelling) governmental interest of compensating those who were interned during World War II because of racial prejudice.

The district court, finally, did not address Mr. Jacob's claim that he is similarly situated to the Aleuts. And since Mr. Jacobs does not even allege that the United

States failed to provide him with reasonable care, or that he was relocated from Brooklyn "long after any danger to his home village had passed," *cf.* 50 App. U.S.C. § 1989a(b), we will not address it either.

III. Conclusion

We vacate the district court's holding that Mr. Jacobs has no standing to bring his suit, but we reject Mr. Jacobs's claim on the merits. Congress's finding that Japanese Americans were the victims of prejudice, while German Americans were not, is broad enough to cover children as well as adults; and it is amply supported by historical evidence that the internment policy extended to Japanese American but not to German American children. Congress, therefore, had clear and sufficient reason to compensate interns of Japanese but not German descent; and the compensation is substantially related (as well as narrowly tailored) to Congress's compelling interest in redressing a shameful example of national discrimination.

We conclude, in short, that the Civil Liberties Act of 1988 does not deprive Mr. Jacobs of the equal protection of the laws, and we remand to the district court with instructions to enter judgment on the merits in favor of the defendants.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-0607 JGP

ARTHUR D. JACOBS, *et al.*,
Plaintiffs

v.

RICHARD THORNBURGH, *et al.*,
Defendants

MEMORANDUM

[Filed Jan. 22, 1991]

The plaintiff, Arthur D. Jacobs,[1] filed this action pursuant to the Fifth Amendment to the Constitution of the United States seeking a declaratory judgment (28 U.S.C. §§ 2201-2202) on the grounds that the Civil Liberties Act of 1988, and the Aleutian and Pribilof Islands Restitution Act, 50 U.S.C. App. § 1989 *et seq.* are unconstitutional. The case is before the Court on the defendants' Motion to Dismiss on the grounds that the plaintiff has failed to establish standing, justifying dismissal under Fed. R. Civ. P. 12(b)(1) and alternatively, on the grounds that the plaintiff has failed to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6), because the challenged laws are constitutional.

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[1] The plaintiff Arthur D. Jacobs is the only named plaintiff; the other "plaintiffs" being described as "unnamed members of the class." Throughout this Memorandum the Court will refer only to the named plaintiff.

I

Briefly, the plaintiff alleges as follows: He is an American citizen who was born in Brooklyn, New York in 1933. Complaint par. 4. On February 27, 1945, as the consequence of the internment of his father, plaintiff was interned at Ellis Island, New York. Complaint par. 15. He remained at Ellis Island until April 26, 1945 when he and his family were transferred to the Crystal City, Texas relocation center were they arrived on April 29, 1945. *Id.* On December 1, 1945, the plaintiff and his family were transferred back to Ellis Island, New York, arriving there on December 4, 1945. *Id.*

The plaintiff complains that the Civil Liberties Act of 1988 (1988 Act) and the Aleutian and Pribilof Islands Restitutions Act (Islands Act) are unconstitutional because they deny the plaintiff equal protection of the laws in violation of the Fifth Amendment to the Constitution.

Plaintiff alleges that Congress enacted the 1988 Act to make reparations to United States citizens of Japanese ancestry and resident Japanese aliens who were relocated or interned during World War II. Complaint par. 8. He states that the purpose of the reparations is to compensate the above persons of Japanese ancestry, or their heirs, for the fundamental violation of their basic civil liberties and constitutional rights which occurred during World War II. *Id.* Under the 1988 Act, the Attorney General of the United States is to identify and locate each eligible individual and is authorized to disburse from the Civil Liberties Public Education Fund (1988 Fund) the sum of $20,000, unless the individual refuses. 50 U.S.C. § 1989(b)(4). Complaint pars. 9 and 10.

Plaintiff alleges that the Islands Act, a companion act to the 1988 Act, was enacted in an effort to provide appropriate compensation for losses to residents of those islands, hereinafter referred to as "Aleuts," which were attributable to the conduct of the United States forces and other officials and employees of the United States.

Complaint par. 12. The Islands Act established the Aleutian and Pribilof Islands Restitution Fund (Islands Fund) and provides that the Secretary of the Treasury shall pay to each Aleut eligible for payment under the Islands Act the sum of $12,000. Complaint pars. 13 and 14.

Plaintiff contends that the 1988 Act and the Islands Act are "unconstitutional on their face and as applied because they discriminate on the basis of natural (sic) origin. Specifically, they provide reparations to a limited class of individuals who were relocated or interned during World War II and deny reparations to similarly situated individuals." Complaint par. 1.

The defendants move to dismiss on the grounds that the plaintiff has failed to establish standing and alternatively, that the plaintiff has failed to state a claim for which relief can be granted because the acts are constitutional.

After giving careful consideration to the motion, the opposition thereto, and the record in this case, the Court concludes that the plaintiff lacks standing and that accordingly, the case must be dismissed.

II

The defendants have moved to dismiss on two separate grounds; first, on the grounds that the plaintiff has failed to demonstrate standing, and second, that the plaintiff has failed to state a claim for which relief may be granted. The Court will address the issue of standing.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975) (citation omitted). The Supreme Court in *Warth* went on to state:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. . . . The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . ."
>
> Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the court's decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. . . Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. . ."

Warth, U.S. at 498-99, S.Ct. at 2205 (citations and footnotes omitted). The Supreme Court went on to observe:

> Moreover, Congress may grant an express right to action to persons who otherwise would be barred by

> prudential standing rules. Of course, Art III's requirement remains: *the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.*

Warth, U.S. at 501, S.Ct. at 2206 (citation omitted, emphasis this Court's).

In *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843 (1969), the Supreme Court ruled:

> The indispensable requirement is, of course, that the party seeking relief allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. . . The decisions of this Court have also made it clear that something more than an "adversary interest" is necessary to confer standing. *There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action.*

U.S. at 423, S.Ct. at 1849-50 (citations omitted, emphasis this Court's).

The defendants argue that the plaintiff lacks standing to maintain this action because "the connection between the alleged 'personal' injury—denial of equal protection of the laws—and the challenged action of Congress is too attenuated to establish standing for purposes of Article III." Defendants' memorandum in support of motion to dismiss (Defendants' Memorandum) at 25. The defendants complain that "it is even difficult to discern the precise way in which Plaintiff is alleging that the injury he suffered is fairly traceable to the challenged action." Defendants' Memorandum at 28. Finally, the defendants

suggested that the Court "should require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." *Id.* citing *Warth v. Seldin*, 422 U.S. 590, 501, 95 S.Ct. 2197, 2206-2207 (1975).

In response to the defendant's invitation to amend or file an affidavit, the plaintiff filed two affidavits, one signed by one of his counsel and one signed by him. The affidavit signed by counsel apparently purports to be an affidavit pursuant to Fed. R. Civ. P. 56(f)[2] and adds nothing in support of the plaintiff's contention that he has established standing. The second affidavit is signed by the plaintiff and sets forth the following facts: That the plaintiff is an American citizen, that his father was born in Germany, that his father emigrated to the United States in 1928, that his father was a permanent resident alien during the entire time he lived in this country, that his father was arrested in February 1944 and interned at Ellis Island, that thereafter his entire family was sent to the Crystal City, Texas internment camp where they remained until December 1945, that while in Crystal City he chose to attend the German school because his family believed that they would be deported to Germany and he needed to learn German, that he met and made friends with Japanese children, that he was able to observe, first hand, the conditions of the camp and that: "Based upon what he observed, everything at the camp was identical for all residents. The Japanese were treated no differently from anyone else." Jacobs' Affidavit. In his opposition to the motion, the plaintiff also argues that this litigation will reveal "that there was a military justification for the large scale exclusion of individuals of Japanese descent, because intelligence data has revealed that the

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[2] Plaintiff argues that since the defendants went outside of the pleading and cited the Court to the legislative history that the defendants have converted the motion to dismiss into a motion for summary judgment. *See* Fed. R. Civ. P. 56. This Court does not agree.

Japanese government and numerous individuals of Japanese descent in the United States were attempting to organize massive fifth-column activities, thus undermining the Defendants' claim of a qualitative difference in treatment." Plaintiff's Opposition at 3-4.

While it is not necessary for the Court to give much time to the history leading up to the passage of the 1988 Act and the Islands Act, some brief mention of that history is necessary to focus on the standing question presented to the Court. Some the of background is also set forth in *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 93 (1945); *Yasui v. United States*, 320 U.S. 115, 63 S.Ct. 1392 (1943) and *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375 (1943).

In 1980, the Congress of the United States established the Commission on Wartime Relocation and Internment of Civilians to: (1) review the circumstances of Executive Order Numbered 9066 and the impact of that Executive Order on American citizens and permanent resident aliens, (2) review directives of United States military forces requiring the relocation and, in some cases, the detention of American citizens and permanent resident aliens and (3) recommend appropriate remedies. The report of that Commission was released in December 1982 and is entitled, *Personal Justice Denied*. A flavor of some of the materials considered by the Commission can be found in the testimony of General DeWitt, Military Commander of the Western Defense Command which comprised the Pacific Coast states, before the House Naval Affairs Subcommittee in April 1943 where he stated, in part:

> General DeWitt: I have the mission of defending this coast and securing vital installations. The danger of the Japanese was, and is now, —if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty.

> Mr. Bates: You draw a distinction between Japanese and Italians and Germans? We have a great number of Italians and Germans and we think they are fine citizens. There may be exceptions.
>
> General DeWitt: You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area—problems which I don't want to worry about.

Personal Justice Denied at 66. The Commission went on to state:

> "Under General DeWitt's guidance from the Presidio, the War Department, moved toward the momentous exclusion of American citizens from the West Coast without any thoughtful, thorough analysis of the problems, if any, of sabotage and espionage on the West Coast or of realistic solutions to those problems.

Personal Justice Denied at 66-67.

The situation involving the Aleuts was different in that the Aleuts were moved from their islands during World War II for their own safety since some of the Aleutian Islands were invaded by Japanese armed forces. As a result of the move, the Aleuts suffered injury and losses of their personal goods and items important in their culture.

The 1988 Act and the Islands Act were designed to, in some small degree, provide compensation to both groups. In passing the legislation, Congress stated as its purpose:

§ 1989. Purposes

The purpose of this Act [sections 1989 to 1989d of this Appendix] are to—

(1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;

(2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;

(3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;

(4) make restitution to those individuals of Japanese ancestry who were interned;

(5) make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law, for—

(A) injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II;

(B) personal property taken or destroyed by United States forces during World War II;

(C) community property, including community church property, taken or destroyed by United States forces during World War II; and

(D) traditional village lands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use;

(6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and

(7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.

§ 1989a. Statement of the Congress

(a) With regard to individuals of Japanese ancestry

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damage, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

(b) With respect to the Aleuts

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, the Aleut civilian residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island were relocated during World War II to temporary camps in isolated regions of southeast Alaska where they remained, under United States control and in the care of the United States, until long after any potential danger to their home villages had passed. The United States failed to provide reasonable care for the Aleuts, and this resulted in widespread illness, disease, and death among the residents of the camps; and the United States further

failed to protect Aleut personal and community property while such property was in its possession or under its control. The United States has not compensated the Aleuts adequately for the conversion or destruction of personal property, and the conversion or destruction of community property caused by the United States military occupation of Aleut villages during World War II. There is no remedy for injustices suffered by the Aleuts during World War II except an Act of Congress providing appropriate compensation for those losses which are attributable to the conduct of United States forces and other officials and employees of the United States.

III

This Court cannot discern the basis upon which the plaintiff contends that he has been injured by the 1988 Act or the Islands Act. Congress concluded after an extensive study by the Commission of the actions taken during World War II against Japanese who were citizens or permanent resident aliens that those persons suffered "fundamental injustice" at the hands of the government and the 1988 Act was designed to compensate them, in some small measure, for that injustice. Congress noted that the "grave injustice" was motivated "largely by racial prejudice, wartime hysteria, and a failure of political leadership." Section 1989a. While the motivation for the actions taken against the Aleuts was different, Congress still found that these people also suffered an injustice at the hands of their government resulting in "widespread illness, disease, and death among the residents of the camps" and the lost of personal and community property. In acting, Congress had the power to address those wrongs and to adopt statutes to correct or remedy those wrongs where possible. *See Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997 (1990); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758 (1980).

Turning to the facts in this case, the Court accepts as true the facts as stated in the complaint. *Jenkins*, 395 U.S. at 421, 89 S.Ct. at 1849. Those facts are that the plaintiff was born in the United States and because of the interment of his father, he was first interned at Ellis Island and then transferred, together with his family to the Crystal City texas relocation camp. Nothing stated in these facts supports the claim that the plaintiff has standing. As we noted, the defendants in moving to dismiss on the grounds of standing, argued that the plaintiff had failed to establish that he has standing and invited him either to amend his complaint or to file an affidavit in order to establish standing. The plaintiff opposed the motion to dismiss and added the following facts: His father was born in Germany, emigrated to the United States, was a permanent resident and was interned at set forth in the complaint. For reasons not clear to the Court the plaintiff states that when the family was sent to Crystal City, he met and played with Japanese children and that the Japanese were treated no differently then anyone else. Jacobs' Affidavit.

For the purposes of the pending motion only, the Court accepts the new facts set forth in the affidavit as an amendment to the complaint, but those facts do not establish that the plaintiff has standing to pursue this action. "[T]he plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." But plaintiff does not state that he suffered any such injury resulting from the legislation at issue. The fact that he was interned is simply not enough to establish standing.[3] As the government notes, the plaintiff does not allege that there is any similarity between his internment and that of those persons referred to in the above Acts. The Acts bestow benefits on eligible Japanese and Aleuts as the

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[3] The only "harm" referred to by the plaintiff is his internment. *See* Complaint, par. 16.

result of an *injustice* that they suffered at the hands of their government. The facts set forth in the complaint and the affidavit make no such argument; indeed, all the plaintiff argues is that he was interned as the result of his father's internment. His father may well have been interned for valid reasons—without further facts, the Court must assume that the actions of the government were valid. If this be so then it is obvious that the plaintiff is not entitled to relief. Nothing in the record suggests that the internment of his father was in violation of law or unconstitutional or an injustice. Yet, it is for those reasons that the Japanese and Aleuts are the beneficiaries under the respective Acts.

Due to the failure of the plaintiff to establish standing, this action must be dismissed and the Court need not address the second part of the motion.

Although the above is sufficient reason to dismiss this case, it cannot be overlooked that Congress and the Commission established by it considered this specific question. The Commission and Congress specifically studied the government's action toward Japanese citizens and permanent resident aliens and the government's actions toward the German and Italian citizens and permanent resident aliens and found a clear distinction between the treatment of the Japanese on one side and the treatment of Germans and Italians on the other side. But, this is not relevant because the plaintiff has failed to alleged that any governmental misconduct led to the his internment or the internment of his father and family.

This case must be dismissed for lack of standing. An appropriate order has been entered.

[Jan. 22, 1991]

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-0607 JGP

ARTHUR D. JACOBS, *et al.*,
Plaintiffs

v.

RICHARD THORNBURGH, *et al.*,
Defendants

ORDER

Pursuant to the accompanying Memorandum, it is hereby

ORDERED that this case is dismissed.

Date: Jan. 22, 1991

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

APPENDIX C

STATUTORY PROVISIONS

TITLE I—UNITED STATES CITIZENS OF JAPANESE ANCESTRY AND RESIDENT JAPANESE ALIENS

§ 1989. Purposes

The purposes of this Act [sections 1989 to 1989d of this Appendix] are to—

(1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United Sttaes citizens and permanent resident aliens of Japanese ancestry during World War II;

(2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;

(3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;

(4) make restitution to those individuals of Japanese ancestry who were interned;

(5) make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law, for—

(A) injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II;

(B) personal property taken or destroyed by United States forces during World War II;

(C) community property, including community church property, taken or destroyed by United States forces during World War II; and

(D) traditional village lands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use;

(6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and

(7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.

(Pub. L. 100-383, § 1, Aug. 10, 1988, 102 Stat. 903.)

§ 1989a. Statement of the Congress

(a) With regard to individuals of Japanese ancestry

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

(b) With respect to the Aleuts

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, the Aleut civilian residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island were relocated during World War II to temporary camps in isolated regions of southeast Alaska where they remained, under United States control and in the care of the United States, until long after any potential danger to their home villages had passed. The United States failed to provide reasonable care for the Aleuts, and this resulted in widespread illness, disease, and death among the residents of the camps; and the United States further failed to protect Aleut personal and community property while such property was in its possession or under its control. The United States has not compensated the Aleuts adequately for the conversion or destruction of personal property, and the conversion or destruction of community property caused by the United States military occupation of Aleut villages during World War II. There is no remedy for injustices suffered by the Aleuts during World War II except an Act of Congress providing appropriate compensation for those losses which are attributable to the conduct of United States forces and other officials and employees of the United States.

(Pub. L. 100-383, § 2, Aug. 10, 1988, 102 Stat. 903.)

TITLE I—UNITED STATES CITIZENS OF JAPANESE ANCESTRY AND RESIDENT JAPANESE ALIENS

§ 1989b. Short title

This title [sections 1989b to 1989b-8 of this Appendix] may be cited as the "Civil Liberties Act of 1988".

(Pub. L. 100-383, title I, § 101, Aug. 10, 1988, 102 Stat. 904.)

§ 1989b-1. Remedies with respect to criminal convictions

(a) Review of convictions

The Attorney General is requested to review any case in which an individual living on the date of the enactment of this Act [Aug. 10, 1988] was, while a United States citizen or permanent resident alien of Japanese ancestry, convicted of a violation of—

(1) Executive Order Numbered 9066, dated February 19, 1942;

(2) the Act entitled "An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones", approved March 21, 1942 (56 Stat. 173); or

(3) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action taken by or on behalf of the United States or its agents, representatives, officers, or employees, respecting the evacuation, relocation, or internment of individuals solely on the basis of Japanese ancestry;

on account of the refusal to such individual, during the evacuation, relocation, and internment period, to accept treatment which discriminated against the individual on the basis of the individual's Japanese ancestry.

(b) Recommendations for pardons

Based upon any review under subsection (a), the Attorney General is requested to recommend to the President for pardon consideration those convictions which the Attorney General considers appropriate.

(c) Action by the President

In consideration of the statement of the Congress set forth in section 2(a) [section 1989a(a) of this Appen-

dix], the President is requested to offer pardons to any individuals recommended by the Attorney General under subsection (b).

(Pub. L. 100-383, title I, § 102, Aug. 10, 1988, 102 Stat. 904.)

§ 1989b-2. Consideration of Commission findings by departments and agencies

(a) Review of applications by eligible individuals

Each department and agency of the United States Government shall review with liberality, giving full consideration to the findings of the Commission and the statement of the Congress set forth in section 2(a) [section 1989a(a) of this Appendix], any application by an eligible individual for the restitution of any position, status, or entitlement lost in whole or in part because of any discriminatory act of the United States Government against such individual which was based upon the individual's Japanese ancestry and which occurred during the evacuation, relocation, and internment period.

(b) No new authority created

Subsection (a) does not create any authority to grant restitution described in that subsection, or establish any eligibility to apply for such restitution.

(Pub. L. 100-383, title I, § 103, Aug. 10, 1988, 102 Stat. 905.)

§ 1989b-3. Trust Fund

(a) Establishment

There is established in the Treasury of the United States the Civil Liberties Public Education Fund, which shall be administered by the Secretary of the Treasury.

(b) Investment of amounts in the Fund

Amounts in the Fund shall be invested in accordance with section 9702 of title 31, United States Code.

(c) Uses of the Fund

Amounts in the Fund shall be available only for disbursement by the Attorney General under section 105 [section 1989b-4 of this Appendix] and by the Board under section 106 [section 1989b-5 of this Appendix].

(d) Termination

The Fund shall terminate not later than the earlier of the date on which an amount has been expended from the Fund which is equal to the amount authorized to be appropriated to the Fund by subsection (e), and any income earned on such amount, or 10 years after the date of the enactment of this Act [Aug. 10, 1988]. If all of the amounts in the Fund have not been expended by the end of that 10-year period, investments of amounts in the Fund shall be liquidated and receipts thereof deposited in the Fund and all funds remaining in the Fund shall be deposited in the miscellaneous receipts account in the Treasury.

(e) Authorization of appropriations

There are authorized to be appropriated to the Fund $1,250,000,000, of which not more than $500,000,000 may be appropriated for any fiscal year. Any amounts appropriated pursuant to this section are authorized to remain available until expended.

(Pub. L. 10-383, title L, § 104, Aug. 10, 1988, 102 Stat. 905.)

§ 1989b-4. Restitution

(a) Location and payment of eligible individuals

(1) In general

Subject to paragraph (6), the Attorney General shall, subject to the availability of funds appro-

priated to the Fund for such purpose, pay out of the Fund to each eligible individual the sum of $20,000, unless such individual refuses, in the manner described in paragraph (4) to accept the payment.

(2) Location of eligible individuals

The Attorney General shall identify and locate, without requiring any application for payment and using records already in the possession of the United States Government, each eligible individual. The Attorney General should use funds and resources available to the Attorney General, including those described in subsection (c), to attempt to complete such identification and location within 12 months after the date of the enactment of this Act [Aug. 10, 1988]. Any eligible individual may notify the Attorney General that such individual is an eligible individual, and may provide documentation thereofer. The Attorney General shall designate an officer or employee to whom such notification and documentation may be sent, shall maintain a list of all individuals who sumbit such notification and documentation, and shall, subject to the availability of funds appropriated for such purpose, encourage, through a public awareness campaign, each eligible individual to submit his or her current address to such officer or employee. To the extent that resources referred to in the second sentence of this paragraph are not sufficent to complete the identification and location of all eligible individuals, there are authorized to be appropriated such sums as may be necessary for such purpose. In any case, the identification and location of all eligible individuals shall be completed within 12 months after the appropriation of funds under the preceding sentence. Failure to be identified and located by the end of the 12-month period specified in the preceding sentence shall not preclude

an eligible individual from receiving payment under this section.

(3) Notice from the Attorney General

The Attorney General shall, when funds are appropriated to the Fund for payments to an eligible individual under this seciton, notify that eligible individual in writing of his or her eligibility for payment under this section. Such notice shall inform the eligible individual that—

(A) acceptance of payment under this section shall be in full satisfaction of all claims against the United States arising out of acts described in section 108(2)(B) [section 1989b-7(2)(B) of this Appendix], and

(B) each eligible individual who does not refuse, in the manner described in paragraph (4), to accept payment under this section within 18 months after receiving such written notice shall be deemed to have accepted payment for purposes of pararaph (5).

(4) Effect of refusal to accept payment

If an eligible individual refuses, in a written document filed with the Attorney General, to accept any payment under this section, the amount of such payment shall remain in the Fund and no payment may be made under this section to such individual at any time after such refusal.

(5) Payment in full settlement of claims against the United States

The acceptance of payment by an eligible individual under this section shall be in full satisfaction of all claims against the United States arising out of acts described in section 108(2)(B) [section 1989b-

7(2)(B) of this Appendix]. This paragraph shall apply to any eligible individual who does not refuse, in the manner described in paragraph (4) to accept payment under this section within 18 months after receiving the notification from the Attorney General referred to in paragraph (3).

(6) Exclusion of certain individuals

No payment may be made under this section to any individual who, after September 1, 1987, accepts payment pursuant to an award of a final judgment or a settlement on a claim against the United States for acts described in section 108(2)(B) [section 1989b-7(2)(B) of this Appendix], or to any surviving spouse, child, or parent of such individual to whom paragraph (6) applies.

(7) Payments in the case of deceased persons

(A) In the case of an eligible individual who is deceased at the time of payment under this section, such payment shall be made only as follows:

(i) If the eligible individual is survived by a spouse who is living at the time of payment, such payment shall be made to such suriviving spouse.

(ii) If there is no suriviving spouse described in clause (i), such payment shall be made in equal shares to all children of the eligible individual who are living at the time of payment.

(iii) If there is no surviving spouse described in clause (i) and if there are no children described in clause (ii), such payment shall be made in equal shares to the parents of the eligible individual who are living at the time of payment.

If there is no surviving spouse, children, or parents described in clauses (i), (ii), and (iii), the amount

of such payment shall remain in the Fund, and may be used only for the purposes set forth in section 106(b) [section 1989b-5(b) of this Appendix].

(B) After the death of an eligible individual, this subsection and subsections (c) and (f) shall apply to the individual or individuals specified in subparagraph (A) to whom payment under this section will be made, to the same extent as such subsections apply to the eligible individual.

(C) For purposes of this paragraph—

(i) the "spouse" of an eligible individual means a wife or husband of an eligible individual who was married to that eligible individual for at least 1 year immediately before the death of the eligible individual;

(ii) a "child" of an eligible individual includes a recognized natural child, a step-child who lived with the eligible individual in a regular parent-child relationship, and an adopted child; and

(iii) a "parent" of an eligible individual includes fathers and mothers through adoption.

(b) Order of payments

The Attorney General shall endeavor to make payments under this section to eligible individuals in the order of date of birth (with the oldest individual on the date of the enactment of this Act [Aug. 10, 1988] (or, if applicable, that individual's survivors under paragraph (6)) receiving full payment first), until all eligible individuals have received payment in full.

(c) Resources for locating eligible individuals

In attempting to locate any eligible individual, the Attorney General may use any facility or resource of any

public or nonprofit organization or any other record, document, or information that may be available to the Attorney General.

(d) Administrative costs not paid from the Fund

No costs incurred by the Attorney General in carrying out this section shall be paid from the Fund or set off against, or otherwise deducted from, any payment under this section to any eligible individual.

(e) Termination of duties of Attorney General

The duties of the Attorney General under this section shall cease when the Fund terminates.

(f) Clarification of treatment of payments under other laws

Amounts paid to an eligible individual under this section—

(1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering; and

(2) shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code, or the amount of such benefits.

(Pub. L. 100-383, title I, § 105, Aug. 10, 1988, 102 Stat. 905.)

§ 1989b-5. Board of Directors of the Fund

(a) Establishment

There is established the Civil Liberties Public Education Fund Board of Directors, which shall be responsible for making disbursements from the Fund in the manner provided in this section.

(b) Uses of the Fund

The Board may make disbursements from the Fund only—

(1) to sponsor research and public educational activities, and to publish and distribute the hearings, findings, and recommendations of the Commission, so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood; and

(2) for reasonable administrative expenses of the Board, including expenses incurred under subsections (c)(3), (d), and (e).

(c) Membership

(1) Appointment

The Board shall be composed of 9 members appointed by the President, by and with the advice and consent of the Senate, from individuals who are not officers or employees of the United States Government.

(2) Terms

(A) Except as provided in subparagraphs (B) and (C), members shall be appointed for terms of 3 years.

(B) Of the members first appointed—

(i) 5 shall be appointed for terms of 3 years, and

(ii) 4 shall be appointed for terms of 2 years,

as designated by the President at the time of appointment.

(C) Any member appointed to fill a vacancy occurring before the expiration of the term for which such member's predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of such member's term until such member's successor has taken office. No individual may be appointed as a member for more than 2 consecutive terms.

(3) Compensation

Members of the Board shall serve without pay, except that members of the Board shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out the functions of the Board, in the same manner as persons employed intermittently in the United States Government are allowed expenses under section 5703 of title 5, United States Code.

(4) Quorum

5 members of the Board shall constitute a quorum but a lesser number may hold hearings.

(5) Chair

The Chair of the Board shall be elected by the members of the Board.

(d) Director and staff

(1) Director

The Board shall have a Director who shall be appointed by the Board.

(2) Additional staff

The Board may appoint and fix the pay of such additional staff as it may require.

(3) Applicability of civil service laws

The Director and the additional staff of the Board may be appointed without regard to section 5311(b) of title 5, United States Code, and without regard to the provisions of such title governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the compensation of any employee of the Board may not exceed a rate equivalent to the minimum rate of basic pay payable for GS-18 of the General Schedule under section 5332(a) of such title.

(e) Administrative support services

The Administrator of General Services shall provide to the Board on a reimbursable basis such administrative support services as the Board may request.

(f) Gifts and donations

The Board may accept, use, and dispose of gifts or donations of services or property for purposes authorized under subsection (b).

(g) Annual reports

Not later than 12 months after the first meeting of the Board and every 12 months thereafter, the Board shall transmit to the President and to each House of the Congress a report describing the activities of the Board.

(h) Termination

90 days after the termination of the Fund, the Board shall terminate and all obligations of the Board under this section shall cease.

(Pub. L. 100-383, title I, § 106, Aug. 10, 1988, 102 Stat. 908.)

§ 1989b-6. Documents relating to the internment

(a) Preservation of documents in National Archives

All documents, personal testimony, and other records created or received by the Commission during its inquiry shall be kept and maintained by the Archivist of the United States who shall preserve such documents, testimony, and records in the National Archives of the United States. The Archivist shall make such documents, testimony, and records available to the public for research purposes.

(b) Public availability of certain records of the House of Representatives

(1) The Clerk of the House of Representatives is authorized to permit the Archivist of the United States to make available for use records of the House not classified for national security purposes, which have been in existence for not less than thirty years, relating to the evacuation, relocation, and internment of individuals during the evacuation, relocation, and internment period.

(2) This subsection is enacted as an exercise of the rulemaking power of the House of Representatives, but is applicable only with respect to the availability of records to which it applies, and suspersedes other rules only to the extent that the time limitation established by this section with respect to such records is specifically inconsistent with such rules, and is enacted with full recognition of the constitutional right of the House to change its rules at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(Pub. L. 100-383, title I, § 107, Aug. 10, 1988, 102 Stat. 909.)

§ 1989b-7. Definitions

For the purposes of this title [sections 1989b to 1989b-8 of this Appendix]—

(1) the term "evacuation, relocation, and internment period" means that period beginning on December 7, 1941, and ending on June 30, 1946;

(2) the term "eligible individual" means any individual of Japanese ancestry who is living on the date of the enactment of this Act [Aug. 10, 1988] and who, during the evacuation, relocation, and internment period—

(A) was a United States citizen or a permanent resident alien; and

(B) (i) was confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of—

(I) Executive Order Numbered 9066, dated February 19, 1942;

(II) the Act entitled "An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones", approved March 21, 1942 (56 Stat. 173); or

(III) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action taken by or on behalf of the United States or its agents, representatives, officers, or employees, respecting the evacuation, relocation, or internment of individuals solely on the basis of Japanese ancestry; or

(ii) was enrolled on the records of the United States Government during the period beginning

on December 7, 1941, and ending on June 30, 1946, as being in a prohibited military zone;

except that the term "eligible individual" does not include any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country;

(3) the term "permanent resident alien" means an alien lawfully admitted into the United States for permanent residence;

(4) the term "Fund" means the Civil Liberties Public Education Fund established in section 104 [section 1989b-3 of this Appendix];

(5) the term "Board" means the Civil Liberties Public Education Fund Board of Directors established in section 106 [section 1989b-5 of this Appendix]; and

(6) the term "Commission" means the Commission on Wartime Relocation and Internment of Civilians, established by the Commission on Wartime Relocation and Internment of Civilians Act (Public Law 96-317; 50 U.S.C. App. 1981 note).

(Pub. L. 100-383, title I, § 108, Aug. 10, 1988, 102 Stat. 910.)

§ 1989b-8. Compliance with Budget Act

No authority under this title [sections 1989b to 1989b-8 of this Appendix] to enter into contracts or to make payments shall be effective in any fiscal year except to such extent and in such amounts as are provided in advance in appropriations Acts. In any fiscal year, total benefits conferred by this title shall be limited to an amount not in excess of the appropriations for such fiscal year. Any provision of this title which, directly or indirectly, authorizes the enactment of new budget au-

thority shall be effective only for fiscal year 1989 and thereafter.

(Pub. L. 100-383, title I, § 109, Aug. 10, 1988, 102 Sat. 910.)

TITLE II—ALEUTIAN AND PRIBILOF ISLANDS RESTITUTON

§ 1989c. Short title

This title [sections 1989c to 1989c-8 of this Appendix] may be cited as the "Aleutian and Pribilof Islands Restitution Act".

(Pub. L. 100-383, title II, § 201, Aug. 10, 1988, 102 Stat. 911.)

§ 1989c-1. Definitions

As used in this title [sections 1989c to 1989c-8 of this Appendix]—

(1) the term "Administrator" means the person appointed by the Secretary under section 204 [section 1989c-3 of this Appendix];

(2) the term "affected Aleut villages" means the surviving Aleut villages of Akutan, Atka, Nikolski, Saint George, Saint Paul, and Unalaska, and the Aleut village of Attu, Alaska;

(3) the term "Association" means the Aleutian/Pribilof Islands Association, Inc., a nonprofit regional corporation established for the benefit of the Aleut people and organized under the laws of the State of Alaska;

(4) the term "Corporation" means the Aleut Corporation, a for-profit regional corporation for the Aleut region organized under the laws of the State of Alaska and established under section 7 of the Alaska Native Claims Settlement Act (Public Law 92-203; 43 U.S.C. 1606);

(5) the term "eligible Aleut" means any Aleut living on the date of the enactment of this Act [Aug. 10, 1988]—

(A) who, as a civilian, was relocated by authority of the United States from his or her home village on the Pribilof Islands or the Aleutian Islands west of Unimak Island to an internment camp, or other temporary facility or location, during World War II; or

(B) who was born while his or her natural mother was subject to such relocation;

(6) the term "Secretary" means the Secretary of the Interior;

(7) the term "Fund" means the Aleutian and Pribilof Islands Restitution Fund established in section 203 [section 1989c-2 of this Appendix]; and

(8) the term "World War II" means the period beginning on December 7, 1941, and ending on September 2, 1945.

(Pub. L. 100-383, title II, § 202, Aug. 10, 1988, 102 Stat. 911.)

§ 1989c-2. Aleutian and Pribilof Islands Restitution Fund

(a) Establishment

There is established in the Treasury of the United States the Aleutian and Pribilof Islands Restitution Fund, which shall be administered by the Secretary. The Fund shall consist of amounts appropriated to it pursuant to this title [section 1989c to 1989c-8 of this Appendix].

(b) Report

The Secretary shall report to the Congress, not later than 60 days after the end of each fiscal year, on the financial condition of the Funds, and the results of the

operations of the Fund, during the preceding fiscal year and on the expected financial condition and operations of the Fund during the current fiscal year.

(c) Investment

Amounts in the Fund shall be invested in accordance with Section 9702 of title 31, United States Code.

(d) Termination

The Secretary shall terminate the Fund 3 years after the date of the enactment of this Act [Aug. 10, 1988], or 1 year following disbursement of all payments from the Fund, as authorized by this title [sections 1989c to 1989c-8 of this Appendix], whichever occurs later. On the date the Fund is terminated, all investments of amounts in the Fund shall be liquidated by the Secretary and receipts thereof deposited in the Fund and all funds remaining in the Fund shall be deposited in the miscellaneous receipts account in the Treasury.

(Pub. L. 100-383, title II, § 203, Aug. 10, 1988, 102 Stat. 911.)

§ 1989c-3. Appointment of Administrator

As soon as practicable after the date of the enactment of this Act [Aug. 10, 1986], the Secretary shall offer to undertake negotiations with the Association, leading to the execution of an agreement with the Association to serve as Administrator under this title [sections 1989c to 1989c-8 of this Appendix]. The Secretary may appoint the Association as Administrator if such agreement is reached within 90 days after the date of the enactment of this title. If no such agreement is reached within such period, the Secretary shall appoint another person as Administrator under this title, after consultation with leaders of affected Aleut villages and the Corporation.

(Pub. L. 100-383, title II, § 204, Aug. 10, 1988, 102 Stat. 912.)

§ 1989c-4. Compensation for community losses

(a) In general

Subject to the availability of funds appropriated to the Fund, the Secretary shall make payments from the Fund, in accordance with this section, as restitution for certain Aleut losses sustained in World War II.

(b) Trust

(1) Establishment

The Secretary shall, subject to the availability of funds appropirated for this purpose, establish a trust for the purposes set forth in this section. Such trust shall be established pursuant to the laws of the State of Alaska, and shall be maintained and operated by not more than seven trustees, as designated by the Secretary. Each affected Aleut village may submit to the Administrator a list of three prospective trustees. The Secretary, after consultation with the Administrator, affected Aleut villages, and the Corporation, shall designate not more than seven trustees from such lists as submitted.

(2) Administration of trust

The trust established under this subsection shall be administered in a manner that is consistent with the laws of the State of Alaska, and as prescribed by the Secretary, after consultation with representatives of eligible Aleuts, the residents of affected Aleut villages, and the Administrator.

(c)[1] Accounts for the benefit of Aleuts
(1) In general

The Secretary shall deposit in the trust such sums as may be appropriated for the purposes set forth in

[1] So in original. Two subsecs. (c) have been enacted.

this subsection. The trustees shall maintain and operate 8 independent and separate accounts in the trust for purposes of this subsection, as follows:

(A) One account for the independent benefit of the wartime Aleut residents of Attu and their descendants.

(B) Six accounts for the benefit of the 6 surviving affected Aleut villages, one each for the independent benefit of Akutan, Atka, Nikolski, Saint George, Saint Paul, and Unalaska, respectively.

(C) One account for the independent benefit of those Aleuts who, as determined by the Secretary, upon the advice of the trustees, are deserving but will not benefit directly from the accounts established under subparagraphs (A) and (B).

The trustees shall credit to the account described in subparagraph (C) an amount equal to 5 percent of the principal amount deposited by the Secretary in the trust under this subsection. Of the remaining principal amount, an amount shall be credited to each account described in subparagraphs (A) and (B) which bears the same proportion to such remaining principal amount as the Aleut civilian population, as of June 1, 1942, of the village with respect to which such account is established bears to the total civilian Aleut population on such date of all affected Aleut villages.

(2) Uses of accounts

The trustees may use the principal, accrued interest, and other earnings of the accounts maintained under paragraph (1) for—

(A) the benefit of elderly, disabled, or seriously ill persons on the basis of special need;

(B) the benefit of students in need of scholarship assistance;

(C) the preservation of Aleut cultural heritage and historical records;

(D) the improvement of community centers in affected Aleut villages; and

(E) other purposes to improve the condition of Aleut life, as determined by the trustees.

(3) Authorization of appropriations

There are authorized to be appropriated $5,000,000 to the Fund to carry out this subsection.

(d) Compensation for damaged or destroyed church property

(1) Inventory and assessment of property

The Administrator shall make an inventory and assessment of real and personal church property of affected Aleut villages which was damaged or destroyed during World War II. In making such inventory and assessment, the Administrator shall consult with the trustees of the trust established under subsection (b), residents of affected Aleut villages, affected church members and leaders, and the clergy of the churches involved. Within 1 year after the date of the enactment of this Act [Aug. 10, 1988], the Administrator shall submit such inventory and assessment, together with an estimate of the present replacement value of lost or destroyed furnishings and artifacts, to the Secretary.

(2) Review by the Secretary; deposit in the trust

The Secretary shall review the inventory and assessment provided under paragraph (1), and shall deposit in the trust established under subsection (b) an amount reasonably calculated by the Secretary to

compensate affected Aleut villages for church property lost, damaged, or destroyed during World War II.

(3) Distribution of compensation

The trustees shall distribute the amount deposited in the trust under paragraph (2) for the benefit of the churches referred to in this subsection.

(4) Authorization of appropriations

There are authorized to be appropriated to the Fund $1,400,000 to carry out this subsection.

(c)[1] Administrative and legal expenses

(1) Reimbursement for expenses

The Secretary shall reimburse the Administrator, not less often than annually, for reasonable and necessary administrative and legal expenses in carrying out the administrator's responsibilities under this title [sections 1989c to 1989c-8 of this Appendix].

(2) Authorization of appropriations

There are authorized to be appropriated to the Fund such sums as are necessary to carry out this subsection.

(Pub. L. 100-383, title II, § 205, Aug. 10, 1988, 102 Stat. 912.)

§ 1989c-5. Individual compensation of eligible Aleuts

(a) Payments to eligible Aleuts

In addition to payments made under section 205 [section 1989c-4 of this Appendix], the Secretary shall, in accordance with this section, make per capita payments out of the Fund to eligible Aleuts. The Secretary shall pay, subject to the availability of funds appropriated to

the Fund for such payments, to each eligible Aleut the sum of $12,000.

(b) Assistance of Attorney General

The Secretary may request the Attorney General to provide reasonable assistance in locating eligible Aleuts residing outside the affected Aleut villages, and upon such request, the attorney General shall provide such assistance. In so doing, the Attorney General may use available facilities and resources of the International Committee of the Red Cross and other organizations.

(c) Assistance of Administrator

The Secretary may request the assistance of the Administrator in identifying and locating eligible Aleuts for purposes of this section.

(d) Clarification of treatment of payments under other laws

Amounts paid to an eligible Aleut under this section—

(1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering, and

(2) shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code, or the amount of such benefits.

(e) Payment in full settlement of claims against the United States

The payment to an eligible Aleut under this section shall be in full satisfaction of all claims against the United States arising out of the relocation described in section 202(5) [section 1989c-1(5) of this Appendix].

(f) Authorization of appropriations

There are authorized to be appropriated to the Fund such sums as are necessary to carry out this section.

(Pub. L. 100-383, title II, § 206, Aug. 10, 1988, 102 Stat. 914.)

Supreme Court, U.S.
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No. 91-2061

In the Supreme Court of the United States

OCTOBER TERM, 1992

ARTHUR D. JACOBS, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in deciding the merits of petitioner's claim that the Civil Liberties Act of 1988 is unconstitutional.

2. Whether the Civil Liberties Act of 1988 violates the equal protection component of the Fifth Amendment Due Process Clause.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 959 F.2d 313. The opinion of the district court (Pet. App. 19a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1992. The petition for a writ of certiorari was filed on June 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1942, following Japan's attack on Pearl Harbor, President Roosevelt issued Exec.

Order No. 9066, 3 C.F.R. 1092 (1938-1943 comp.). That order authorized the Secretary of War to send persons of Japanese ancestry living in the continental United States to internment camps. Pet. App. 2a. Approximately 120,000 persons of Japanese ancestry were ultimately detained in these camps. H.R. Rep. No. 278, 100th Cong., 1st Sess. 7 (1987).

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians and directed it to review the circumstances surrounding Exec. Order No. 9066. 50 U.S.C. App. 1981 note §§ 3 and 4. After reviewing hundreds of thousands of documents and hearing testimony from over 750 witnesses, the Commission issued a report to Congress in 1982 entitled *Personal Justice Denied.* Pet. App. 4a. That Report detailed evidence that Executive Order No. 9066 and the military orders affecting persons of Japanese ancestry were the products of prejudice and demagoguery rather than military necessity. *Ibid.* The Commission found that persons of German ancestry were treated much differently from persons of Japanese ancestry. *Ibid.* In particular, the Commission found that no mass internment was ordered against persons of German ancestry; actions against such persons were much more selective and individualized. *Ibid.*

In August 1988 Congress responded to the Commission's findings by enacting the Civil Liberties Act of 1988. Recognizing that a "grave injustice" was done to persons of Japanese ancestry by their forced relocation and internment, Congress issued an apology and authorized an award of $20,000 to each internee. 50 U.S.C. App. 1989a, 1989b-4. In taking this remedial action, Congress expressly found that the mass internment of persons of Japanese ancestry was "motivated largely by racial prejudice, wartime

hysteria, and a failure of political leadership." 50 U.S.C. App. 1989a(a). Throughout the debates on this legislation, members of Congress repeatedly noted that no similar program of mass internment had been directed against persons of German ancestry. Pet. App. 16a-17a.

2. In March 1989, petitioner filed suit against the Attorney General of the United States and the Secretary of the Treasury. Pet. App. 5a. He alleged that he was sent to an internment camp as a result of his father's internment. *Id.* at 2a. He further alleged that persons of Japanese ancestry also stayed at this camp and that he was treated no differently from them. *Id.* at 3a. Because the Civil Liberties Act of 1988 provides compensation and an apology to persons of Japanese ancestry but not to persons of German ancestry, petitioner alleged, it discriminates on the basis of race in violation of the Fifth Amendment. Pet. App. 5a. It is undisputed, however, that petitioner's father was interned after an individualized determination concerning his loyalty and not as the result of the kind of mass relocation policy directed against persons of Japanese ancestry. *Id.* at 3a.

The United States moved to dismiss petitioner's complaint for lack of standing and for failure to state a claim upon which relief could be granted. In January 1981, the district court ruled that petitioner lacked standing. Pet. App. 5a-6a. The court explained that while petitioner had alleged that he was interned, he had not alleged that he was interned for the same impermissible reasons as persons of Japanese ancestry. *Ibid.*

The court of appeals disagreed with the district court's ruling on standing, concluding that the court had "confused standing questions with defenses on the merits." Pet. App. 6a. It held that petitioner's

allegation that he was interned was sufficient to establish his standing; he was not required to show that he was interned for the same reasons as persons of Japanese ancestry. *Ibid.* In the court's view, "[e]vidence that the reasons were, in fact, radically different—that Japanese children, for example, were interned because of virulent racial prejudice while [petitioner] was interned after his father received an individualized hearing—is a defense on the merits, not a bar to standing." *Id.* at 6a-7a.

After noting that the district court had not reached the merits of petitioner's claim, the court agreed with the United States that the issue could be resolved without the necessity of a remand. Pet. App. 8a-10a. Although petitioner sought further discovery to determine whether persons of German ancestry were interned for reasons of prejudice, the court observed that Congress had already thoroughly considered this issue and concluded, on the basis of overwhelming historical evidence, that they were not. *Id.* at 9a, 13a-17a. The court therefore concluded that "further discovery on a scrupulously reported historical question would [not] cast any useful light on the case." *Id.* at 9a.

Applying both intermediate scrutiny and strict scrutiny, the court upheld the constitutionality of the Civil Liberties Act. Pet. App. 10a-17a. The court explained that the goal of the Act—to compensate persons who were interned because of racial prejudice—was both important and compelling. *Id.* at 12a. And since persons of Japanese ancestry were interned because of racial prejudice while persons of German ancestry were not, limiting the remedy to persons of Japanese ancestry was both substantially related and narrowly tailored to achieving Congress's remedial goal. *Id.* at 12a-17a.

ARGUMENT

The court of appeals' decision that it could resolve petitioner's claim without the necessity of a remand is consistent with the decisions of this Court and other courts of appeals. Further review on this issue is therefore unwarranted. On the merits, the court of appeals correctly held that the Civil Liberties Act of 1988 is constitutional. As the court of appeals concluded, that statute satisfies the most demanding standard of equal protection review. The petition for a writ of certiorari should therefore be denied.

1. a. Petitioner contends (Pet. 10-11) that the court of appeals did not have authority to decide his constitutional claim because the district court dismissed his complaint for lack of standing and did not reach the merits. According to petitioner, a court of appeals has jurisdiction to decide only those issues resolved by the district court. Petitioner is mistaken. A party is free to defend its judgment, and a court of appeals is free to decide a case against an appellant, "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). See also *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

That principle is fully applicable here. The government sought to dismiss petitioner's complaint in the district court on the merits as well as on standing grounds. Accordingly, even though the district court decided the case in favor of the government on standing grounds alone, the government could defend the judgment, and the court of appeals could decide the case against petitioner, on the alternative ground that his claim lacked merit, because the government had "properly raised" that alternative ground below.

Petitioner argues (Pet. 11-13) that the court of appeals did not affirm the district court's judgment on an alternative ground. Instead, petitioner contends, the court modified the judgment from a dismissal on standing grounds to a final adjudication on the merits, something it could not do absent a cross-appeal. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985) (absent cross-petition, party cannot make an argument that would result in a modification of the judgment). But the court of appeals did not modify the judgment—the judgment was and remains a judgment for the government. It is only the ground of that judgment that has changed—from a judgment for the government on standing grounds to a judgment for the government on the merits. Thus, the court of appeals' decision to address the merits of petitioner's claim reflects a routine application of the alternative ground rule. See *In re Independent Counsel*, 766 F.2d 70, 75 (2d Cir. 1985) (treating standing and the merits as alternative grounds for affirming a judgment); *Cospito* v. *Heckler*, 742 F.2d 72, 78 n.8 (3d Cir. 1984) (same), cert. denied, 471 U.S. 1131 (1985); *Koniag, Inc., Uyak* v. *Andrus*, 580 F.2d 601, 605 n.3 (D.C. Cir.) (same), cert. denied, 439 U.S. 1052 (1978).

b. Petitioner also contends (Pet. 13-15) that the court of appeals should have remanded the case so that he could undertake discovery. When petitioner's counsel was questioned at argument about what she wished to learn through discovery, however, her only suggestion was that she might find evidence that government officials said: "We don't like the Germans; let's gather them up and let's lock them up like we are doing the Japanese." Pet. App. 8a-9a. The court of appeals properly concluded that discovery directed to that issue was unnecessary.

As the court of appeals observed, after thoroughly considering this issue, Congress determined that persons of German ancestry were not subjected to the same kind of racially biased treatment as persons of Japanese ancestry. That determination is entitled to deference from a court. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (Congress's findings entitled to deference); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964) (court must defer to legislative findings that are rational in light of the evidence before Congress).

The evidence before Congress on this question was "hardly controversial." Pet. App. 14a. As detailed by the Commission on Wartime Relocation and Internment of Civilians in its report to Congress, no government official ever seriously proposed the mass relocation of persons of German ancestry. *Id.* at 14a-15a. General DeWitt pressed for the removal of certain categories of persons of German ancestry from the West Coast. *Id.* at 15a. But President Roosevelt rejected even this limited proposal because of widespread political opposition to it. *Ibid.* And while military commanders excluded a small number of persons of German ancestry from certain areas, these individual exclusion orders were based on a review of that person's record. *Ibid.*

In short, the court of appeals soundly concluded that further discovery on this "scrupulously reported historical question" would not "cast any useful light on the case." Pet. App. 9a. Petitioner has failed to demonstrate otherwise.

2. Petitioner argues (Pet. 15-18) that the Civil Liberties Act of 1988 is unconstitutional. That argument is insubstantial. In enacting the Civil Liberties Act of 1988, Congress was seeking to compensate persons who had been relocated or interned during World War II because of racial prejudice. This interest in

remedying past discrimination unquestionably is compelling. *United States* v. *Paradise*, 480 U.S. 149, 167 (1987). Moreover, because persons of Japanese ancestry were relocated and interned because of racial prejudice, while persons of German ancestry were not, Congress's decision to limit its remedial efforts to person of Japanese ancestry is narrowly tailored to achieve its remedial purpose. Put simply, Congress chose to limit its apology and award of monetary compensation to the actual victims of past discrimination. Because the Civil Liberties Act of 1988 satisfies the strict scrutiny test that racial classifications be narrowly tailored to further a compelling interest, it *a fortiori* meets the less exacting standard set forth in *Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997, 3008-3009 (1990).*

* Petitioner also challenged the Aleutian and Pribilof Islands Restitution Act, which authorizes an award of compensation to Aleuts who were relocated during World War II. 50 U.S.C. App. 1989c, 1989c-5. Because petitioner did not allege that his relocation and internment experience was in any way similar to that of the Aleuts, neither the district court nor the court of appeals addressed this claim. Pet. App. 17a-18a. While petitioner discusses this claim in his petition, he does not contend that the lower courts erred in failing to address it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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